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in the

Supreme Court

of the

United States

ORLANDO E. PUCHE,
ENRIQUE ALFONSO PUCHE,
MAURICIO JAVIER PUCHE,

Petitioners,

vs.

UNITED STATES OF AMERICA

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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QUESTIONS PRESENTED

I.

Can a district court, consistent with *Apprendi*, *Booker* and its progeny, choose to vary downward from the Sentencing Guidelines range due to the effect that conduct not found by the jury had on the ultimate sentencing range?

II.

Where a district court relies on several factors to determine a variance from the Guidelines range, and one of those factors is determined to be inappropriate, is resentencing necessary when the district court indicated on the record a clear desire to impose a particular sentence?

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	ii
TABLE OF AUTHORITIES	iv
OPINION BELOW.	2
JURISDICTION	2
CONSTITUTIONAL PROVISION INVOLVED. . 3	
STATEMENT OF THE CASE.	4
REASON FOR GRANTING THE WRIT. . . .	6

1. A sentencing judge can, in its discretion, discount the effect of uncharged or unconvicted conduct on the Sentencing Guidelines range 6

2. Where a district court indicates that it would impose the same sentence regardless of reliance on an improper factor, any error in relying on an improper factor is harmless 12

3. If resentencing is required *United States v. Santos* requires a re-calculation of the amount of laundered proceeds 15

CONCLUSION 16

APPENDIX X

TABLE OF AUTHORITIES

Hughey v. United States, 495 U.S. 411(1990) *9*

Kimbrough v. United States, — U.S. — , 128 S.Ct. 558 (2007) *7*

United States v. Booker, 543 U.S. 220 (2005) 6

United States v. Boardman, 528 F.3d 86 (1st C. 2008) 8

United States v. Duhon, 541 F.3d 391 (5th C. 2008) 13

United States v. Gall, — U.S. —, 128 S.Ct. 586 (2008) 6

United States v. Henson. 534 F.3d 922 (8th C. 2008) 13

United States v. Santos. — U.S. —, 128 S.Ct. 2020 (2008) 15

United States v. Tankersly, 537 F.3d 1100 (9th C. 2008) 8

United States v. White, 519 F.3d 342 (7th C. 2008) 14

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

The Petitioners, Orlando Puche, Enrique Puche, and Mauricio Puche, respectfully pray that a writ of certiorari issue to review the judgement of the United States Court of Appeals for the Eleventh Circuit, entered in the above-entitled proceeding on June 24 , 2008.

OPINION BELOW

The opinion of the Court of Appeals for the Eleventh Circuit is unreported. That determination is attached hereto in Appendix 1. A petition for rehearing was also unreported, and is attached as Appendix 2. The District Court's opinion resentencing the Petitioners is unreported, and is attached hereto as Appendix 3.

JURISDICTION

The judgment of the United States Court of Appeals for the Eleventh Circuit denying a petition for rehearing /rehearing en banc was entered on August 25, 2008. This petition for a writ of certiorari has been filed and docketed within the time prescribed. The jurisdiction of this Court is invoked under 28 U.S.C. §1291 and Supreme Court Rule 12.

CONSTITUTIONAL PROVISION INVOLVED

The Sixth Amendment to the United States Constitution states:

> In all criminal prosecutions, the accused shall enjoy the *right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed*, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; that have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

STATEMENT OF THE CASE

The Petitioners Mauricio Puche, Orlando Puche, and Enrique Puche, were originally indicted on one count relating to money laundering. The Petitioners proceeded to trial and were found guilty by a jury. The Petitioners were originally sentenced to 188 months incarceration (Orlando) and 151 months (Mauricio & Enrique Puche). The Petitioners appealed their convictions and sentences to the Eleventh Circuit Court of Appeals. On November 12, 2003, the Court affirmed the convictions, but remanded for resentencingdue to a Guidelines error.

Thereafter, on December 17, 2004, the Petitioners were resentenced to 135 and 108 months, respectively. The Petitioners again appealed to the Eleventh Circuit, arguing that their sentences were improper. On November 22, 2005, the Court again remanded for resentencing, in light of this Court's *Booker* decision.

Prior to resentencing, both parties filed lengthy memoranda and pleadings which outlined their positions with regards to resentencing. At the beginning of the hearing on January 26, 2007, the district court announced that it had considered the positions of the parties, and imposed a sentence of time served as to each of the defendants. In imposing the sentence, the court noted, in its written opinion, that "Upon weighing all of the relevant concerns, the Court has concluded that without regard to the ultimate calculation of the sentencing guidelines, i.e., whether the Court accepts the government's proposed calculation or that of the defendant or some middle ground, the ultimate sentence that this Court would impose would be the same." At that time, the Petitioners had each served in excess of 66 months

incarceration.

The Government appealed from this sentence, again to the Eleventh Circuit. On June 24, 2008, a panel of the Eleventh determined that the district court was not permitted to rely on certain factors in imposing the sentence of time served, and remanded the case for further proceedings. The Court found that the district court's comments regarding the use of conduct which was not found be the jury was an impermissible factor to consider in imposing a sentence.

REASONS FOR GRANTING THE WRIT

1. A sentencing judge can, in its discretion, discount the effect of uncharged or unconvicted conduct on the Sentencing Guidelines range

This case presents the Court with the "other side" of the *Booker* coin: namely, does a district court have the freedom, under the current Federal sentencing scheme, to discount or eliminate the effect of conduct which was not proven to a jury in imposing a sentence? The Petitioners submit that this Court's precedents clearly indicate that a district court does have that authority, and is not required to give full effect to conduct which was not proven to a jury.

In the remedial portion of *United States v. Booker*, 543 U.S. 220 (2005), this Court determined that a district court, in imposing a sentence, will still utilize the United States Sentencing Guidelines in calculating a sentence. Further, those Guidelines must be correctly calculated.

As this Court found in *United States v. Gall*, — U.S. —, 128 S.Ct. 586 (2008) "As a matter of administration and to secure nationwide consistency, the Guidelines should be the starting point and the initial benchmark. The Guidelines are not the only consideration, however. Accordingly, after giving both parties an opportunity to argue for whatever sentence they deem appropriate, the district judge should then consider all of the § 3553(a) factors to determine whether they support the sentence requested by a party. In so doing, he may not presume that the Guidelines range is reasonable. [ ] He must make an

individualized assessment based on the facts presented. If he decides that an outside-Guidelines sentence is warranted, he must consider the extent of the deviation and ensure that the justification is sufficiently compelling to support the degree of the variance." 128 S.Ct. at 597

Thus, the district court has been given considerable discretion post-*Booker* to impose a sentence that he or she considers reasonable, after considering each of the 3553(a) factors.

In the present case, the district court, by all accounts, correctly calculated the Sentencing Guidelines. The court then determined that he was discounting the value of that conduct which was neither presented to or proven to the jury. The court imposed a variance sentence below the Guidelines, based in part on the court's determination that the uncharged conduct increased the sentence to a level more harsh than required.

The Petitioner submits that the district court was well within his discretion to disagree with the effect uncharged conduct had on the Guidelines sentencing range. In *Kimbrough v. United States*, — U.S. — , 128 S.Ct. 558 (2007), this Court considered whether a district court, in imposing a sentence, could disagree with the effects of the Guidelines themselves. In that case, the Guidelines treated crack cocaine 100 times more severe than powder cocaine. The district court judge in *Kimbrough* disagreed with the effect that this 100:1 ratio had on the Guidelines range, and sentenced the defendant below that range. The Fourth Circuit reversed, finding that the district court did not have the ability to disagree with the Guidelines on this

issue. This Court, however, determined that the district court did indeed have the authority to impose a sentence less than required by the Guidelines. The Court found that the sentencing court's determination was reasonable, and created a sentence sufficient, but not greater than necessary, to meet 18 U.S.C. § 3553A standards. The variance was thus upheld.

Since *Kimbrough*, circuit courts have applied the rationale in *Kimbrough* to other Guidelines determinations. For instance, in *United States v. Boardman*, 528 F.3d 86 (1st C. 2008), the First Circuit held that resentencing should occur where a district court did not understand its discretion to disagree with a Guidelines policy statement regarding criminal history. Similarly, the Ninth Circuit, in the case of *United States v. Tankersly*, 537 F.3d 1100 (9th C. 2008) upheld the district court's upward adjustment of a sentence from the Guidelines range based solely upon the district court's disagreement with the Guidelines stance on whether a terrorism enhancement should apply. The Ninth Circuit determined that the district court was within its discretion to disagree with the Guidelines statement, and impose its own sentence. *Id.* at 1112-1113

The Petitioners submit that the district court was well within its discretion to discount the effect of uncharged conduct in determining the sentence. As such, the sentence of time served must be upheld as a reasonable use of the district court's discretion.

The Petitioners would further note that there are no statutes or Guidelines which require the use of uncharged conduct in determining an appropriate sentence.

First, there is no mention in the Sentencing Reform Act of guideline ranges being calculated based on uncharged separate crimes. Rather, the plain language demonstrates that, to the extent Congress contemplated "real offense" sentencing, it intended that guideline ranges for a given offense of conviction would differ based on the circumstances of that offense, not that guideline ranges would be increased based on uncharged other offenses.

Congress directed the Commission to take into account "the circumstances under which the offense was committed" and the "nature and degree of the harm caused by the offense," and to "avoid[] unwarranted sentencing disparities among defendants . . . who have been found guilty of similar criminal conduct," 28 U.S.C. §§ 994(c)(2), (3), 991(b)(1)(B) It directed that the courts "shall impose a sentence sufficient, but not greater than necessary" "to reflect the seriousness of the offense" and "to provide just punishment for the offense," and in doing so to consider the "nature and circumstances of the offense," and "the need to avoid unwarranted sentence disparities among defendants . . . who have been found guilty of similar conduct," 18 U.S.C. § 3553(a)(1), (2)(A), (6)

A "straightforward reading" of the word "offense" means the "offense of conviction," *Hughey v. United States*, 495 U.S. 411, 416 (1990), and this is particularly clear where Congress simultaneously directed the Commission and the courts to avoid disparity among defendants "found guilty" of similar conduct.

The Senate Judiciary Committee expected "that there will be numerous guideline ranges, each

describing a somewhat different combination of . . . offense circumstances." S. Rep. No. 98-225, at 168 (1983) (emphasis added). The House Judiciary Committee explicitly rejected sentencing based on offenses the government failed to prove at trial: "The legislation does not authorize, nor does the Committee approve of, the use of sentencing guidelines based on allegations not proved at trial. To permit 'real offense' sentencing guidelines would present serious constitutional problems as well as substantial policy difficulties." H.R. Rep. No. 98-1017, at 98 (1984).

Congress "examine[d]" the initial set of "guidelines promulgated under section 994(a)(1)," but not policy statements promulgated under section 994(a)(2) or any commentary. See Pub. L. 98-473, Title II, § 253, reprinted at 18 U.S.C. § 3551. Thereafter, the Commission has submitted to Congress only "amendments to the guidelines," which Congress may modify or disapprove but otherwise automatically take effect. See 28 U.S.C. § 994(p); *Stinson v. United States*, 508 U.S. 36, 40-46 (1993). Policy statements, commentary to guidelines, and commentary to policy statements are not reviewed by Congress. *Ibid.* The initial relevant conduct guideline, presumably examined by Congress, described it as "all conduct, circumstances, and injuries relevant to the offense of conviction," and made no reference to offenses the government failed to prove at trial. USSG §1B1.3 (Nov. 1, 1987) (emphasis added). On January 15, 1988, the following language was buried in the background commentary to USSG §1B1.3, unreviewed by Congress: "Relying on the entire range of conduct, regardless of the number of counts . . . on which a conviction is obtained, appears to be the most reasonable approach to writing workable guidelines for these offenses," i.e.,

"offenses of a character for which §3D1.2(d) would require grouping of multiple counts." USSG §1B1.3, comment. (backg'd.); App. C, Amend. 3 (Jan. 15, 1988). On Nov. 1, 1990, the phrase, "this provision does not require the defendant, in fact, to have been convicted of multiple counts," was added, again in commentary not reviewed by Congress. USSG §1B1.3, comment. (n.2); App. C, Amend. 309 (Nov. 1, 1990)

The Sentencing Reform Act does not state a burden of proof for finding guideline facts. The preponderance standard originated in commentary to a policy statement, added in 1991 and never reviewed by Congress. USSG §6A1.3, p.s., comment. (backg'd.) ("The Commission believes that use of a preponderance of the evidence standard is appropriate to meet due process requirements and policy concerns in resolving disputes regarding application of the guidelines to the facts of a case."); USSG App. C, Amend. 387 (Nov. 1, 1991).

Finally, in an amendment to a guideline which Congress did review, the Commission stated that "[i]n determining the sentence within the guideline range, or whether a departure is warranted, the court may consider, without limitation, any information concerning the background, character and conduct of the defendant, unless otherwise prohibited by law." USSG §1B1.4; App. C Amend. 4 (Jan. 15, 1988).

There is therefore ample proof that there is no statutory mandate for the use of uncharged conduct in determining the sentence to be imposed. The district court could not therefore have been in error in discounting its use in the present case.

In sum, the Petitioners submit that the district court was clearly within its discretion to discount the effect of uncharged conduct in determining an appropriate sentence. On this basis, the district court's sentencing decision must be affirmed.

2. Where a district court indicates that it would impose the same sentence regardless of reliance on an improper factor, any error in relying on an improper factor is harmless

In remanding this case for resentencing, the Eleventh Circuit noted "We recognize that the district court stated that it would impose the same sentences regardless of the guidelines range. However, the district court's order suggests that it would do so, in part, because of its conclusion that there was a Sixth Amendment violation in the amount-of-loss figure. Nothing herein suggests any opinion regarding the ultimate sentences imposed in this case. We say only that the district court considered a legally incorrect factor in imposing the sentences here." The Petitioners submit that because the Eleventh Circuit found that the district court would have imposed the same sentence absent the alleged error, that it should have upheld the sentence as harmless error.

The Petitioner would first note that, post *Booker*, the circuits have uniformly held that where a district court indicates his or her intention to impose a particular sentence regardless of the Guidelines calculation, that the district court's discretion has been honored. For instance, in *United States v. Duhon*, 541 F.3d 391 (5th C. 2008), the Fifth Circuit considered

whether a remand was required based upon the district court's miscalculation of the Sentencing Guidelines. The court determined that while the district court "ultimately erred by failing to apply the enhancements, the district court declared that it would have sentenced Duhon to sixty months of probation even if it miscalculated the Guideline range. Under *Bonilla*, the district court's error is not reversible, and we cannot remand on this basis." *Id.* at 396

A similar result occurred in the case of *United States v. Henson*. 534 F.3d 922 (8th C. 2008) In *Henson*, the district court found that the Guidelines were presumptively reasonable, and imposed a sentence within the Guidelines. The defense then pointed out that the presumption may be error (as it was later found to be by this Court), to which the district court replied that even if the court was in error, it would impose the same sentence. On appeal, the defense urged for a remand based upon the error. The Eighth Circuit determined that because the district court was made aware of the error, and indicated its desire to impose a sentence even taking the error out of the equation, that no remand was necessary. *Id.* at 924

In the case of *United States v. White*, 519 F.3d 342 (7th C. 2008), the defendant argued for a remand for resentencing based upon this Court's decision in *Kimbrough*. The Seventh Circuit held, however, that the district court's finding, that he would have imposed the same sentence even if the Guidelines did not exist, made any sentencing error harmless. Thus, no remand for resentencing was required.

The district court stated at resentencing in the instant case that "Upon weighing all of the relevant

concerns, the Court has concluded that without regard to the ultimate calculation of the sentencing guidelines, i.e., whether the Court accepts the government's proposed calculation or that of the defendant or some middle ground, the ultimate sentence that this Court would impose would be the same." Clearly, the court's intention was to impose a sentence of time served regardless of its Guidelines findings. The Eleventh Circuit's decision in requiring a remand places it in conflict with other circuits that have passed on this issue.

Under these circumstances, a remand for resentencing would be a futile endeavor, and a waste of judicial resources. The appellate court should have accepted the alternative grounds for the sentence imposed. As such, the sentence must be affirmed.

3. If resentencing is required *United States v. Santos* requires a re-calculation of the amount of laundered proceeds

At resentencing, the Petitioners challenged the amount used to calculate the base offense level. The sentencing court determined that the amount was correct, and determined the Guidelines using the Government's proposed figure.

If this Court allows resentencing in this matter, then the trial court should utilize this Court's recent decision in *United States v. Santos*. — U.S. —, 128 S.Ct. 2020 (2008) In *Santos*, the Court held that for purposes of money laundering, the term "proceeds" referred to criminal profits, and thus, the statute must

be limited as such. In the present case, if only criminal profits are considered, there would be no provable amount of monies to enhance the Petitioners sentences. As such, if this Court allows for resentencing, *Santos* requires a recalculation of the base offense level.

CONCLUSION

The Petitioners request that this Court reverse the findings of the Court of Appeals and affirm the decision of the district court.

Respectfully submitted,

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APPENDIX

1. Court of Appeals opinion June 24, 2008

2. Court of Appeals opinion August 25, 2008

2. District Court decision January 26, 2007

APPENDIX 1

[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 07-10929
Non-Argument Calendar

D.C. Docket No. 00-00933-CR

UNITED STATES OF AMERICA,

Plaintiff-Appellant,

versus

ORLANDO E. PUCHE,
MAURICIO JAVIER PUCHE,
ENRIQUE ALFONSO PUCHE,

Defendants-Appellees.

No. 07-10930
Non-Argument Calendar

D. C. Docket No. 00-00933-CR-

SH

UNITED STATES OF AMERICA,

Plaintiff-Appellant,

versus

MAURICIO JAVIER PUCHE,

Defendant-Appellee.

No. 07-10931
Non-Argument Calendar

D. C. Docket No. 00-00933-CR-

SH

UNITED STATES OF AMERICA,

Plaintiff-Appellant,

versus

ENRIQUE ALFONSO PUCHE,

Defendant-Appellee.

Appeals from the United States District Court
for the Southern District of Florida

(June 24, 2008)

Before BARKETT, HULL and PRYOR, Circuit Judges.

PER CURIAM:

After a second resentencing, the government appeals the district court's sentence of time served (approximately 66 months imprisonment) imposed on Orlando Puche, Enrique Puche, and Mauricio Puche ("the Puches") for their convictions for one count of conspiracy to commit money laundering, in violation of 18 U.S.C. § 1956(a)(3) and (h). These 66-month sentences are a downward variance from Orlando Puche's advisory guidelines range 796 of 135 to 168 months' imprisonment and Enrique and Mauricio Puche's advisory guidelines ranges of 108 to 135 months' imprisonment. After review, we conclude that the district court based its variance on a legally erroneous factor, and thus we vacate and remand.

I. BACKGROUND

This appeal marks the third occasion that this case has been before us. We briefly review its procedural history.

A. Conviction, Sentencing and First Direct Appeal

The Puches proceeded to trial on the single charge of conspiracy to commit money laundering. The trial evidence established that the Puches owned and operated a money transmittal company, Gloria Exchange Corporation ("GEC"), in Miami, Florida. United States v. Puche, 350 F.3d 1137, 1141 (11th Cir.2003). The Drug Enforcement Agency ("DEA"), in connection with local police, conducted a sting operation targeting another money transmittal company, wherein an officer "posed as a drug dealer responsible for collecting cash from various drug sales locations and forwarding money to overseas accounts." Id. Through the owner of the other company, officers eventually met with employees of the Puches. See id. at 1141-42. Over the next few months, agents brought a total of $714,500 in small bills to the Puches' GEC, which was deposited into GEC's accounts and then transferred to accounts in Canada and England that

were controlled by the DEA. Id. at 1142. The jury found the Puches guilty.

At a sentencing hearing in April 2002, the district court calculated guidelines ranges of 188 to 235 months' imprisonment for Orlando Puche and 135 to 168 months' imprisonment for Enrique and Mauricio Puche. The district court sentenced Orlando Puche to 188 months' imprisonment, and Enrique and Mauricio Puche to 151 months' imprisonment each, all of which were at the low end of their respective guidelines ranges. The Puches were imprisoned on July 27, 2001, when the jury found them guilty.

In November 2003, this Court affirmed the Puches' convictions but concluded that the district court erroneously failed to apply a three-level reduction to their offense levels under U.S.S.G. § 2X1.1(b)(2). See id. at 1156-57. Accordingly, this Court vacated the Puches' sentences and remanded to the district court "for the limited purpose of applying the three-level reduction

under U.S.S.G. § 2X1.1(b)(2) and then resentencing within the resulting U.S.S.G. range." Id. at 1157.

B. Resentencing and Second Direct Appeal

At a resentencing hearing in December 2004, the district court applied the three-level § 2X1.1(b)(2) reduction and recalculated guidelines ranges of 135 to 168 months' imprisonment for Orlando Puche and 108 to 135 months' imprisonment for Enrique and Mauricio Puche. The district court resentenced Orlando Puche to 135 months' imprisonment and Enrique and Mauricio Puche to 108 months' imprisonment, all of which were at the low end of their respective guideline ranges.

In this second appeal, this Court concluded that "the district court committed statutory BookerFN1 error by sentencing the Puches under a mandatory system," and that such error was not harmless because the record did not indicate how the district 797 court would have sentenced the Puches under an advisory guidelines system. See United States v. Puche, 155 Fed.Appx. 487,

490-93 (11th Cir.2005) (unpublished). Accordingly, this Court again vacated the Puches' sentences and remanded "for the limited purpose of resentencing pursuant to Booker." Id. at 493. To that end, this Court's opinion instructed that:

FN1. The Supreme Court decided United States v. Booker, 543 U.S. 220, 125 S.Ct. 738, 160 L.Ed.2d 621 (2005), after this Court's opinion in the Puches' first appeal.

[T]he district court is required to sentence the Puches under an advisory Sentencing Guidelines regime, and shall consider the Sentencing Guidelines range of 135 to 168 months' imprisonment for Orlando Puche, and the range of 108 to 135 months' imprisonment for Enrique and Mauricio Puche, and "other statutory concerns as well, see 18 U.S.C. § 3553(a)...."

Id. at 493-94 (quoting Booker, 543 U.S. at 245, 125 S.Ct. at 757) (bracket omitted).

C. Briefing Before Resentencing

Prior to their second resentencing, the Puches filed sentencing memoranda arguing that several factors supported resentencing them below the guidelines range and that sentences of time served would further the purposes of 18 U.S.C. § 3553(a). Specifically, the Puches cited these factors: (1) their money laundering operation was non-violent, (2) there were no third-party victims, (3) they had worked to better themselves while incarcerated, (4) they had a strong support system of family and friends, (5) they would not pose a threat to society if released, and (6) the amount-of-loss figure used to enhance their guidelines calculations violated their Sixth Amendment rights because it was not submitted to the jury.FN2

FN2. Although Orlando, Mauricio, and Enrique Puche filed separate sentencing memoranda, their arguments were essentially identical.

The Puches later filed a supplemental memorandum that (1) cited several cases where defendants who laundered more money than they did received sentences below the Puches' guidelines ranges, and (2) cited a Department of Justice report stating that the average sentence for those convicted of money laundering offenses was 44 months' imprisonment and that approximately one-quarter of those convicted in 2001 of money laundering offenses received only probation. The Puches also submitted letters from friends and family that described them as good, hard-working men.

The government's brief responded that sentences of time served would not be appropriate. Instead, the government recommended that sentences at the low end of the advisory guidelines range-i.e., 135 months' imprisonment for Orlando Puche and 108 months' imprisonment for Enrique and Mauricio Puche-were reasonable in light of the § 3553(a) factors. In response

to the Puches' claim of Booker error in the amount-of-loss figure under an advisory regime, the government argued that (1) the loss amount was, in fact, determined by the jury when it found the forfeiture amount, and (2) post- Booker, judge-found facts may still be used to calculate the advisory guidelines range and need not be charged, proven beyond a reasonable doubt, or admitted by the defendant.

D. Order Resentencing to Time Served

Upon receipt of the briefing and before the start of the resentencing hearing, the district court issued a written order on January 26, 2007 resentencing the Puches to time served (which was 66 months at that time). FN3 The district court's order noted 798 that, pursuant to the Eleventh Circuit's mandate, the district court was instructed "to reconsider its sentence of the Defendants under an advisory Sentencing Guidelines regime, as

opposed to the mandatory regime." The order also stated that at the Puches' original sentencing, it had expressed its "deep dissatisfaction" with imposing a sentence within the guidelines range and its opinion that the guidelines "in this instance are quite harsh." The district court's order again observed that post-Booker the guidelines are advisory and that the court, after considering the guidelines range, "is permitted to tailor a sentence in light of other statutory concerns, such as relevant individual circumstances."

FN3. The government makes no claim of procedural error as to the order being entered before the resentencing hearing.

The district court's order listed the § 3553(a) factors. It then noted that this Court had held that post-sentence rehabilitative conduct was an impermissible factor to consider at sentencing, but recognized here "other factors warranting a downward departure from the

recommended Guidelines range." The district court found these factors warranted a lesser sentence: (1) there was no violence connected with the Puches' offense or any third-party victims; (2) the Puches' had "strong familial ties" and "an otherwise impressive support system comprised of friends and family"; and (3) "because the Defendants' amounts of loss were not submitted to the jury, the use of such amounts violates the Sixth Amendment right to a jury trial on all issues." The district court pointed out that, in this case, the Puches' base offense levels were increased due to conduct found at sentencing that was not determined by the jury.

The district court stated that upon weighing the above relevant concerns, the defendants should be resentenced to time served, as follows:

Upon weighing all of the relevant concerns, the Court has concluded that without regard to the ultimate calculation of the sentencing guidelines, i.e., whether

the Court accepts the government's proposed calculation or that of the defendant or some middle ground, the ultimate sentence that this Court would impose would be the same. Thus, under Fed.R.Crim.P. 32(i)(3)(B), the Court need not undertake the resolution of the disputed sentencing factors in the presentence report, because the ultimate sentence would be identical in any event, even under the calculations presently contained in the presentence report. To the extent that a calculation of the guidelines is required, the Court will proceed with the acceptance of the guideline range as determined by the probation officer. The Court concludes that, after considering the factors enumerated in Title 18 U.S.C. § 3553(a), the Defendants should be resentenced to a sentence that is no "greater than necessary" to comply with the comprehensive statutory factors. The Court will therefore impose a sentence of TIME SERVED. Accordingly, it is ordered that the Puches be released

from custody.

E. Resentencing Hearing

At the start of the resentencing hearing on January 26, 2007, the district court indicated that the parties had already been provided with copies of its above-described resentencing order. The district court stated that because the court preferred "substance over form," it would be a "relatively short" resentencing hearing. The district court reiterated that it had commented on many occasions in the past about "the harshness of the punishment imposed" and that those matters had been addressed in its order.

The district court then formally sentenced the Puches to time served and three years' supervised release, but noted that it would "favorably consider" a motion to terminate the final year of supervised release if the Puches successfully completed the first two years. The sentences of time served (which was 66 months) were a downward variance from Orlando Puche's advisory

guidelines range of 135 to 168 months' imprisonment and from Enrique and Mauricio Puche's advisory guidelines ranges of 108 to 135 months' imprisonment. The district court inquired if the Puches objected to their sentences, and they said they did not. The district court did not make the same inquiry of the government before adjourning the hearing.

II. DISCUSSION

A. Sentencing Post- Gall

After the Supreme Court's decisions in Booker and Gall v. United States, 552 U.S. ----, 128 S.Ct. 586, 169 L.Ed.2d 445 (2007), the district courts are still required to correctly calculate the advisory guidelines range. See United States v. Pugh, 515 F.3d 1179, 1189 (11th Cir.2008). If the district court decides that a sentence outside of the guidelines is warranted, it " 'must consider the extent of the deviation and ensure that the justification is sufficiently compelling to support the degree of the variance.' " Id. at 1190 (quoting Gall, 552

U.S. at ····, 128 S.Ct. at 597) (emphasis omitted).

Gall emphasized that "while the extent of the difference between a particular sentence and the recommended Guidelines range is surely relevant, courts of appeals must review all sentences-whether inside, just outside, or significantly outside the Guidelines range-under a deferential abuse-of-discretion standard." Id. at 1189 (quoting Gall, 552 U.S. at ····, 128 S.Ct. at 591). Under Gall, we must engage in a two-step process of sentencing review. See id. at 1190. First, we must " 'ensure that the district court committed no significant procedural error, such as failing to calculate (or improperly calculating) the Guidelines range, treating the Guidelines as mandatory, failing to consider the § 3553(a) factors, selecting a sentence based on clearly erroneous facts, or failing to adequately explain the chosen sentence-including an explanation for any deviation from the Guidelines range.' " Id. (quoting Gall, 552 U.S. at ····, 128 S.Ct. at 597).

Second, we must consider the " 'substantive reasonableness of the sentence imposed, under an abuse-of-discretion standard,' " taking into account the " 'totality of the circumstances.' " Id. (quoting Gall, 552 U.S. at ····, 128 S.Ct. at 597). In considering the substantive reasonableness of the sentence, we may " 'not apply a presumption of unreasonableness' " where a sentence is outside of the Guidelines range, and we " 'must give due deference to the district court's decision that the § 3553(a) factors, on a whole, justify the extent of the variance.' " Id. (quoting Gall, 552 U.S. at ····, 128 S.Ct. at 597).

A sentence may be substantive unreasonable " 'when the district court selects the sentence arbitrarily, bases the sentence on impermissible factors [or] fails to consider pertinent section 3553(a) factors.' " Id. at 1192 (quotation marks omitted) (emphasis added). If such an error exists, we will vacate the sentence and remand, unless the error was harmless. See United States v.

Keene, 470 F.3d 1347, 1349 (11th Cir.2006). A district court's consideration of an impermissible factor at sentencing is harmless if the record as a whole shows the error did not substantially affect the district court's selection of the sentence imposed. See United States v. Mathenia, 409 F.3d 1289, 1292 (11th Cir.2005).

We now apply the two-step appellate review process outlined in Gall to the Puches' sentences of time served.

B. The Puches' Time-Served Sentences

As to the first prong of the analysis outlined by Gall, we conclude that the district court did not commit procedural error in sentencing the Puches. By adopting the advisory guidelines ranges calculated in the presentence investigation report, which were the same guidelines ranges that this Court instructed the district court to consider on remand, the district court properly calculated the advisory guidelines range. The district court stated that it had considered the advisory guidelines range and the § 3553(a) factors, along with

the pleadings filed by the parties, in its sentencing decision. The district court then listed the § 3553(a) factors, even though it was not required to do so. Finally, the district court explained its reasons as to why a sentence of time served was sufficient, but not greater than necessary to satisfy the § 3553(a) factors. In light of the above, we conclude that there was no procedural error in the district court's decision.

As to the second prong of the analysis outlined in Gall, however, we conclude that the Puches' sentences are substantively unreasonable because the district court based its Booker variance on a legally erroneous factor. See Pugh, 515 F.3d at 1192. The district court accepted the guidelines calculations by the probation officer. However, in outlining the factors supporting the Booker variance to a time-served sentence, the district court stated that the guidelines enhancement of the Puches' base offense levels based on the amount of loss violated their Sixth Amendment rights because the loss figure

was not submitted to the jury. This statement was incorrect because " 'the use of extra-verdict enhancements in an advisory guidelines system is not unconstitutional.' " United States v. Chau, 426 F.3d 1318, 1323-24 (11th Cir.2005) (quoting United States v. Rodriguez, 398 F.3d 1291, 1301 (11th Cir.2005)). In other words, enhancement of the Puches' sentences based on a loss figure that was not submitted to the jury did not violate the Puches' Sixth Amendment rights under Booker because the district court was now resentencing the Puches' under an advisory guidelines scheme. See id. at 1324 (stating that a sentencing court could make fact findings beyond those charged in the indictment "because it applied the guidelines in an advisory way" and that "[n]othing in Booker is to the contrary"); Rodriguez, 398 F.3d at 1300 (stating, in reviewing a pre- Booker sentence, that "if the same extra-verdict enhancements had been found and used in the same way in a non-mandatory guidelines system

the result would have been constitutionally permissible"). Thus, the district court based the extent of its sentence variance on a legally incorrect factor, i.e., a supposed Sixth Amendment violation that did not exist.FN4

FN4. We reject the Puches' argument that the government waived its objections to their sentences. Further, we cannot say that the district court's consideration of this alleged Sixth Amendment error in its Booker variance sentences was harmless. The district court's sentencing order does not indicate that it gave the alleged Sixth Amendment error any less weight than the other factors listed as a basis for its Booker variance. While the district court's statements expressing "deep dissatisfaction" with the guidelines range and its opinion that a guidelines sentence was "quite harsh" strongly suggest that it would make some downward variance from the advisory guidelines range,

it is not clear that the district court would have varied downward to the same extent if not for its misconception regarding the Sixth Amendment violation. FN5 Therefore, because the record as a whole does not show that the misconception about the alleged Sixth Amendment violation did not substantially affect the district court's decision to impose Booker variance sentences of time served, we vacate the Puches' sentences and remand to the district court for the limited purpose of resentencing the Puches without consideration of this factor.

FN5. We recognize that the district court stated that it would impose the same sentences regardless of the guidelines range. However, the district court's order suggests that it would do so, in part, because of its conclusion that there was a Sixth Amendment violation in the amount-of-loss figure.Nothing herein suggests any opinion regarding the ultimate sentences imposed

in this case. We say only that the district court considered a legally incorrect factor in imposing the sentences here.

SENTENCES VACATED AND REMANDED WITH INSTRUCTIONS.

BARKETT, Circuit Judge, Dissenting:

Based on this record, I would affirm the sentencing order imposed by the district court. Although the structure of the sentencing order creates some ambiguity, it does not clearly indicate that the district court partially based the variance on the legally erroneous ground. Therefore, I see no reason to question the district court's statement that it would impose the same sentence in the case. See United States v. Dean, 517 F.3d 1224, 1232 (11th Cir.2008) (reiterating that we will uphold the sentence imposed by the district court where the sentence is reasonable and the district court states that it would impose the same sentence irrespective of any sentencing

calculation errors).

APPENDIX 2

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 07-10929

D.C. Docket No. 00-00933-CR

UNITED STATES OF AMERICA,

Plaintiff-Appellant,

versus

ORLANDO E. PUCHE,
MAURICIO JAVIER PUCHE,
ENRIQUE ALFONSO PUCHE,

Defendants-Appellees.

No. 07-10930

UNITED STATES OF AMERICA,

Plaintiff-Appellant,

versus

MAURICIO JAVIER PUCHE,

Defendant-Appellee.

No. 07-10931

UNITED STATES OF AMERICA,

Plaintiff-Appellant,

versus

ENRIQUE ALFONSO PUCHE,

Defendant-Appellee.

Appeals from the United States District Court
for the Southern District of Florida

JUDGMENT

It is hereby ordered, adjudged, and decreed that the attached opinion included herein by reference is entered as the judgment of this Court.

Entered: August 25, 2008
For the Court: Thomas K. Kahn, Clerk
By: Harper, Toni

APPENDIX 3

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 00-933-CR-HIGHSMITH

UNITED STATES OF AMERICA,

Plaintiff,

V.

ORLANDO E. PUCHE, ENRIQUE PUCHE, and MAURICIO JAVIER PUCHE,

Defendants.

FINAL ORDER RE-SENTENCING DEFENDANT

THIS CAUSE arises upon the Eleventh Circuit Court of Appeals' mandate [DE *1054]* vacating the Defendants' sentences and remanding jurisdiction over this case to this Court for further proceedings. The Court, having reviewed the pleadings thereafter filed by the parties, and being otherwise duly advised, does hereby RE-SENTENCE the Defendants to TIME

SERVED and direct that they be released from prison forthwith.

The history of this case is well-known and well-documented. This Second resentencing is now before this Court pursuant to an Eleventh Circuit mandate to reconsider its sentence of the Defendants under an *advisory* Sentencing Guidelines regime, as opposed to the *mandatory* regime that had been in place at the time of the last sentencing of the Defendants. As part of that effort then, the Court must also consider the advisory guideline range for the Defendants' sentences and the statutory sentencing factors set forth in Title 18, United States Code, Section §3553(a).

During the Defendants' first sentencing, this Court observed its deep dissatisfaction with imposing, as to the Defendants herein, the sentencing guidelines range that, at the time, appeared to be required. At that time this Court noted:

> I am constrained and obligated by my position to apply [the Sentencing Guidelines] whether I agree with them or not. I know in comparable situations, other successful businessmen, "successful" in terms of money, stature, property, and that sort of thing, in the history of this community had been accused and convicted of activities of this nature in other forums where guidelines were not applicable. Their sentences sometimes were extremely light. Interestingly, most all were matters of probation. The Sentencing ~3uide1ines in this instance are quite harsh, and the Court recognizes that.

Sentencing, April 29, 2002, p. 74.

In the past, federal courts were obligated to impose sentences without any regard to individual circumstances~ With the statutory revisions made by the Supreme Court in United States v. Booker, *543* U.S. 220, *125* S.Ct. 738 (2005), however, the sentencing analysis has changed to reflect the abolition of mandatory guide1ines~ Given Booker's changing of the sentencing discretion of the judicial branch, the Court can do individual justice in all cases, since the Sentencing Guidelines are now advisory. Hence, the

Court must consider the
Guidelines range but is permitted to tailor a sentence in light of other statutory concerns, such as relevant individual circumstances.

Stated differently, the Court has the discretion to calculate a sentence to reflect exactly what Booker requires in terms of judicial consideration of the defendant and the punishment, namely, the multiple factor-analysis under § *3553(a)*. The sentencing court's discretionary application of the broad sentencing policies stated in Title 18 U.S.C. Section § *3553(a)*, rather than merely the advisory guidelines, now controls the ultimate determination of sentence.

Title 18 U.S.C. Section § *3553 a* states in mandatory terms that "[t]he court shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph (2) of this subsection." (Emphasis added.) Congress

divided the factors to be considered under Section § *3553(a)(2)* into categories:

> (A)
> to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offenses;
>
> (B)
> to afford adequate deterrence to criminal conduct;
>
> (C)
> to protect the public from further crimes of the defendant;
>
> (D)
> to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner[.]

A second clause in Section § *3553(a),* however, also provided that "in determining a particular sentence to be imposed," the sentencing court "shall" not only consider the four categories set forth in Subsection (a)(2) (A)-(D), but also the factors set forth in the remaining subparts of

Section § *3553(a)* — i.e., Subsection 3553(a)(1) ("the nature and circumstances of the offense and the history and characteristics of the defendant"); Subsection (a)(3) ("the kinds of sentences available"); Subsection (a)(4) ("the kinds of sentence and the sentencing range established" by the Sentencing Guidelines; subsection (a)(5) ("any pertinent policy statement" of the Sentencing Commission); Subsection (a)(6) "the need to avoid unwarranted sentence disparities"); and Subsection (a)(7) ("the need to provide restitution to any victims of the offense").

While the Court recognizes that post-sentence rehabilitative conduct is an impermissible factor for the District Court's consideration upon second re-sentencing, United States v. Lorenzo, 2006 WL *3526904* (11th Cir. 2006), and balancing that with the purpose of 18 U.S .C. § 3661 ', the Court recognizes other factors warranting a downward departure from the recommended Guidelines range.

With respect to the nature and circumstances of the offense, the Court recognizes that there was no violence connected with this offense, nor were there any

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'18 U.S.C. § 3661 mandates that "[n]o limitation shall, be placed on the information concerning the background, character, and conduct of aperson convicted of an offense which a court of the United States may receive and consider for the purpose of imposing an appropriate sentence."

third-party victims involved in this case. The Court also finds that the Defendants have strong familial ties, have wives, children, grandchildren, nieces and nephews, and an otherwise impressive support system comprised of friends and family.

Moreover, the Court finds that because the Defendants' amounts of loss were not submitted to the jury, the use of such amounts violates the Sixth Amendment right to a jury trial on all issues. In light of Booker, the

Eleventh Circuit has held that the "Sixth Amendment right to a trial by jury is violated where under a mandatory guidelines system a sentence is increased because of an enhancement based on facts found by the judge that were neither admitted by the defendant nor found by the jury." United States v. Rodriguez, 398 F.3d 1291, 1298 (11th Cir. 2005). In this case, the Defendants' base offense levels were increased due to conduct found at sentencing, but not passed upon or determined by the jury.

Upon weighing all of the relevant concerns, the Court has concluded that without regard to the ultimate calculation of the sentencing guidelines, i.e., whether the Court accepts the government's proposed calculation or that of the defendant or some middle ground, the ultimate sentence that this Court would impose would be the same. Thus, under Fed. R. Crim. P. 32(i)(3)(B), the Court need not undertake the resolution of the disputed sentencing factors in

the presentence report, because the ultimate sentence would be identical in any event, even under the calculations presently contained in the presentence report. To the extent that a calculation of the

guidelines is required, the Court will proceed with the acceptance of the guideline range as determined by the probation officer.

The Court concludes that, after considering the factors enumerated in Title 18 U.S.C. § 3 553(a), the Defendants should be re-sentenced to a sentence that is no "greater than necessary" to comply with the comprehensive statutory factors. The Court will therefore impose a sentence of TIME SERVED. All other motions otherwise pending are denied as moot.

WHEREFORE, the Defendants previous sentences are

hereby vacated and the Defendants shall be re-sentenced to a term of TIME SERVED. The Court hereby further orders that the Defendants be released from custody forthwith.

DONE AND ORDERED at Miami, Dade-County, Florida this 2 day of January, 2007.

UNITED STATES DISTRICT JUDGE

copies:
U.S. Marshal (2 certified)

Counsel of Record